

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANE S. KISH and DEPARTMENT OF THE TREASURY,
BUREAU OF CUSTOMS, Miami, Fla.

*Docket No. 96-115; Submitted on the Record;
Issued July 22, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant has more than a three percent permanent impairment to her lower extremities, for which she received a schedule award.

The Office of Workers' Compensation Programs accepted appellant's claim for a contusion to the right buttock and sciatic nerve.¹ Appellant subsequently filed a claim for a schedule injury. Appellant submitted numerous medical reports from Dr. R. Ray Lopez, Board-certified psychiatrist and neurologist, the significant ones being dated February 3, 1992, February 4, 1994 and March 6, 1995 as these address the degree of appellant's impairment. In the February 3, 1992 report, Dr. Lopez stated that he would normally give appellant a rating of 7 to 10 percent of the body as a whole, associated with a degenerated L4-5 intervertebral disc, with bilateral L5 radiculitis but under "Federal Guidelines" that would translate to approximately 18 percent of each lower extremity. In his February 2, 1994 report, Dr. Lopez stated that pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1994), appellant had an eight percent permanent disability of the body as a whole with seven percent ascribed for derangement of the intervertebral disc at L4-5 with right L5 nerve root disturbance and one percent extra for left L5 nerve root disturbance.

By letter dated February 18, 1994, the Office instructed Dr. Lopez to identify, which sensory nerves are affected using Table 68, p. 89 of the A.M.A., *Guides* and identify the degree of impairment using Table 11, p. 48 of the A.M.A., *Guides*. On the same letter, in a note dated March 3, 1994, the Office referred the district medical adviser to Dr. Lopez's February 4, 1994 note, in which Dr. Lopez rated appellant eight percent permanently impaired.

In his report dated July 19, 1994, the district medical adviser noted that the maximum impairment of the lower extremity for L5 nerve root, sensory, is five percent. He noted

¹ This case had previously been on appeal to the Board; see *Diane Susan Kish* Docket No. 89-211 (issued December 9, 1989).

Dr. Lopez's findings that appellant had a one percent impairment to the left L5 root and seven percent of the body for the disc derangement and the right L5 root. The district medical adviser concluded that appellant had a one percent permanent impairment of the left lower extremity and a two percent permanent impairment of the right lower extremity. In a report dated June 7, 1994, the district medical adviser stated that appellant reached maximum medical improvement on June 7, 1994.

By decision dated August 3, 1994, the Office awarded appellant a schedule award for a three percent permanent loss of use of the lower extremity.

By letter dated August 27, 1994, appellant requested an oral hearing before an Office hearing representative which was held on May 4, 1995. At the hearing, appellant addressed issues regarding her worker's compensation claim in general including compensation the government owed her for lost wages, overtime and a step increase. Appellant also submitted additional reports from Dr. Lopez.

In his March 6, 1995 report, Dr. Lopez reiterated his findings in his February 2, 1994 report that pursuant to the A.M.A., *Guides*, appellant had an eight percent permanent disability of the body as a whole. He also stated that the "Federal Guidelines" which he had used in the February 3, 1992 report, were different from the A.M.A., *Guides* and were no longer being used.

By decision dated July 21, 1994, the hearing representative affirmed the Office's August 3, 1994 decision.

The Board finds that appellant has no greater than a three percent permanent loss of use of the lower extremity.

The schedule award provision of the Federal Employees' Compensation Act² provides for compensation to employees sustaining permanent impairment from loss or loss of use of specified members of the body. The Act's compensation schedule specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act does not, however, specify the manner, by which the percentage loss of a member, function, or organ shall be determined. The method used in making such a determination is a matter that rests in the sound discretion of the Office.³ For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants.⁴

In the present case, although in his February 2, 1994 and March 6, 1995 reports, Dr. Lopez stated that he used the A.M.A., *Guides* (4th ed. 1994), he did not state how he obtained

² 5 U.S.C. § 8107 *et seq.*

³ *Arthur E. Anderson*, 43 ECAB 691, 697 (1992); *Danniel C. Goings*, 37 ECAB 781, 783 (1986).

⁴ *Arthur E. Anderson*, *supra* note 3 at 697; *Henry L. King*, 25 ECAB 39, 44 (1973).

the figure of eight percent using them. His opinion is, therefore, of diminished probative value.⁵ The district medical adviser used the A.M.A., *Guides* (4th ed. 1994) in calculating that appellant had a one percent impairment of her left lower extremity and a two percent impairment of her right lower extremity due to impairment of L5 (sensory nerve) affecting both lower extremities. He noted that Dr. Lopez included seven percent impairment of the body as a whole for the disc derangement and the right L5 root and that, absent the seven percent for the disc derangement, appellant had a two percent permanent impairment to the right lower extremity and a one percent permanent impairment to the left lower extremity. The district medical adviser's opinion is consistent with Table 68, page 89 of the A.M.A., *Guides*. Further, neither the Act nor regulations provide for the payment of a schedule award for the permanent loss of use of the back.⁶ Accordingly, the district medical adviser's opinion that appellant had a three percent permanent impairment to her lower extremities constitutes the weight of the evidence.

Accordingly, the decision of the Office of Workers' Compensation Programs dated May 4, 1995 is hereby affirmed.

Dated, Washington, D.C.
July 22, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁵ See *Paul R. Evans*, 44 ECAB 646, 651 (1993).

⁶ See 5 U.S.C. § 8107(c); *George E. Williams*, 44 ECAB 530, 533 (1993).